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No. 78-172

# In the Supreme Court of the United States

OCTOBER TERM, 1978

JIN WON PARK and THE SYSTEMS CORPORATION,
PETITIONERS

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

Neither the opinion of the court of appeals (Pet. App. A-1) nor the opinion of the district court (Pet. App. A-3) is reported.

### JURISDICTION

The judgment of the court of appeals was entered on April 26, 1978. A petition for rehearing was denied on May 25, 1978. The petition for a writ of certiorari was filed on July 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Immigration and Naturalization Service properly found no "exceptional hardship" in denying petitioner's application for waiver of the two-year foreign residence requirement under 8 U.S.C. 1182(e) for student-exchange visitors who seek to live in this country permanently.

2. Whether the foreign residence requirement unconstitutionally imposes de facto deportation on petitioner's children who are United States citizens.

3. Whether the court of appeals improperly equated "exceptional hardship" with "extreme hardship."

4. Whether the Immigration and Naturalization Service in ruling on petitioner's waiver application made a rule applicable to all South Koreans who apply for hardship waivers and was therefore required to comply with the rule-making provisions of the Administrative Procedure Act.

## STATEMENT

In May 1966, petitioner Park,[1] a citizen of the Republic of Korea, successfully applied to enter the United States to study electrical engineering as a nonimmigrant exchange student. See 8 U.S.C. 1101(a)(15)(J) (A.R. 149).[2] Petitioner entered this country in June 1966 (A.R. 147, 148) and ultimately was allowed to extend his stay through December 1973 in order to continue his graduate

[1]Co-petitioner Systems Corporation is petitioner Park's employer. Hereafter, the term "petitioner" will refer to petitioner Park.

[2]"A.R." refers to the administrative record which is part of the record on appeal in the court of appeals. The separately paginated portion of the record on appeal is referred to as "R."



studies (A.R. 146, 144, 142, 140, 138, 136, 134, 119). Every application filled out and signed by petitioner stated that under 8 U.S.C. 1182(e), foreign exchange students are ineligible to apply for an immigrant visa or for permanent residence in this country until they have resided in their home country for at least two years after leaving the United States (A.R. 149, 147, 145, 143, 141, 139, 137, 135, 120). Petitioner was also informed that the two-year foreign residence requirement may be waived under Section 1182(e) if departure from the United States would impose "exceptional hardship" on the alien's spouse or child, if the spouse or child is an American citizen or a resident alien (*Ibid.*).

In 1969, three years after entering this country, petitioner married a Korean citizen. The couple's first child, an American citizen by birth, was born in 1972 (Pet. App. A-3; A.R. 121, 126). In October 1973, deportation proceedings were instituted against petitioner on the ground that he was no longer a student (A.R. 132). In December 1973, petitioner applied for a waiver of the foreign residence requirement, alleging that it would cause exceptional hardship to his citizen child (A.R. 122). Petitioner alleged that he would not be likely to find employment in Korea in his field of computer engineering and that the cost of returning to Korea would impose a financial hardship that in turn would cause "exceptional hardship" to his child (A.R. 127-128).

Petitioner's application was denied by the Acting District Director of the Immigration and Naturalization Service (INS) on the ground that petitioner had alleged usual rather than exceptional hardships (A.R. 116-118). Petitioner appealed to the INS Regional Commissioner, alleging that adverse economic, social, and political conditions in Korea, as well as the possibility that he

would not be permitted to leave that country after the two years, constituted exceptional hardships for his citizen child (A.R. 28, 30-39). The Regional Commissioner dismissed the appeal, observing that (A.R. 29):

> Acceptance of counsel's appeal arguments as valid grounds for a finding of exceptional hardship within the meaning of the statute would, in effect, be a blanket authorization for waiver of the two-year foreign residence requirement for anyone from Korea with a citizen child.

Petitioner then filed a complaint in the United States District Court for the District of Oregon seeking review of the Service's denial of his waiver application (R. 1-6; A.R. 22-27).[3] The district court found no abuse of discretion or arbitrary administrative action, and granted the Service's motion for summary judgment (Pet. App. A-3 to A-10). The court of appeals affirmed in a memorandum opinion (Pet. App. A-1 to A-2).

**ARGUMENT**

1. Petitioner contends (Pet. 9-11) that the INS improperly interpreted Section 1182(e)'s "exceptional hardship" test by allegedly applying to Korean applicants a standard different from that applied to applicants from other countries. This claim misconstrues the administrative action that occurred here.

The apparent basis for petitioner's contention is the Regional Commissioner's statement that acceptance of petitioner's argument "would, in effect, be a blanket authorization for waiver of the two-year foreign residence

[3]Since petitioner and his wife had had a second citizen child in the interim, the district judge remanded the case. The Service again rejected petitioner's claim of exceptional hardship (R. 55-56).



requirement for anyone from Korea with a citizen child." The reference to Korea in that statement is obviously responsive to the contentions made by petitioner with respect to economic, social, and political conditions in that country. Moreover, a review of all three INS opinions in this case (Pet. App. A-15 to A-19; A.R. 28-29, 116-118; R. 55-56) demonstrates that the Service analyzed the totality of petitioner's circumstances and concluded that there was no showing of exceptional hardship as that phrase has been consistently interpreted and applied with regard to applicants from all countries. Thus, petitioner failed to prove that a two-year period of foreign residence would, for instance, significantly endanger an ill citizen child or cause family separation. See *Matter of Ambe*, 13 I. & N. Dec. 3 (Dist. Dir. 1968); *Matter of Vicedo*, 13 I. & N. Dec. 33 (Dist. Dir. 1968). Petitioner alleged the sort of hardships generally entailed in any relocation from the United States to a part of the world that is less developed and less politically free. See, *e.g.*, *Perdido* v. *INS*, 420 F. 2d 1179 (5th Cir. 1969) (no exceptional hardship for Philippine couple with two citizen children); *Matter of Prabhakar*, 13 I. & N. Dec. 314 (Dist. Dir. 1968) (economic hardship and dislocation for citizen child on return to Far East insufficient to show exceptional hardship). Accordingly, the district judge and the court of appeals correctly upheld the Service's exercise of discretion. See *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 76-77 (1957).

Moreover, petitioner's analysis of the exceptional hardship standard would result in granting most if not all applications made by persons from the least-developed countries while denying those made by applicants from the industrialized nations, an outcome that would pervert the congressional purpose embodied in Section 1182(e). That Section was enacted to ensure that persons from

less-developed countries who receive advanced training in this country under our foreign exchange programs would return to their home countries and utilize their training there. See Rep. No. 372, 87th Cong., 1st Sess. 19-20 (1961). Congress left no doubt that, in order to stem the flow of technically skilled workers from the underdeveloped nations, the two-year foreign residence requirement was to be strictly applied even where citizen children were concerned:

> The subcommittee hereby *reiterates and stresses* * * * the fundamental significance of a *most diligent and stringent enforcement of the 2-year foreign residence requirements* of [8 U.S.C. 1182(e)].
>
> It is noted that by far the largest number of applications for waivers of the above-cited provisions of the law come *from nationals of countries who are in urgent need for expansion and improvement of their technological establishments and their health facilities.* It is believed to be detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers *including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from this country would cause personal hardship.*

H.R. Rep. No. 721, 87th Cong., 1st Sess. 121 (1961) (emphasis in original).

Since the denial of petitioner's waiver application was consistent with both the Service's prior practice and the legislative intent behind Section 1182(e), there is no merit to petitioner's claim that the exceptional hardship test was improperly applied here.



2. Petitioner further argues (Pet. 11-14) that the two-year foreign residence requirement of Section 1182(e) works a de facto deportation of his citizen children in violation of due process of law.[4] That contention has been consistently rejected by the courts with respect to Section 1182(e) in particular, *Silverman* v. *Rogers*, 437 F. 2d 102, 107 (1st Cir. 1970), cert. denied, 402 U.S. 983 (1971); *Perdido* v. *INS*, *supra*, 420 F. 2d at 1181-1182; *Mendez* v. *Major*, 340 F. 2d 128, 131-132 (8th Cir. 1965), and with respect to the citizen children of deportees generally. *Mamanee* v. *INS*, 566 F. 2d 1103, 1105-1106 (9th Cir. 1977); *Acosta* v. *Gaffney*, 558 F. 2d 1153, 1157-1158 (3d Cir. 1977).

Congress has the power to determine the conditions under which an alien may enter and remain in this country. The conditions Congress has imposed include a two-year foreign residence requirement for exchange-student visitors who seek to reside here permanently—a requirement of which petitioner had repeated notice (A.R. 149, 147, 145, 143, 141, 139, 137, 135, 120). Section 1182(e) does not affect the citizenship of petitioner's children. They may remain in this country now or leave and return at any time. On the other hand, acceptance of petitioner's argument would substantially undercut the congressional limitations on immigration, in view of the "relative ease with which aliens can enter this country as students or visitors and then delay their departure long

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[4]Insofar as the heading of Point II of petitioner's argument indicates that petitioner is also challenging the constitutionality of his own deportation, his argument is without merit. The continued stay of an alien in this country is not a right but "a matter of permission and tolerance." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 586-587 (1952). Here Congress reasonably imposed a two-year foreign residence requirement on all exchange-student visitors who desire to reside here permanently.

enough to produce citizen children." *Lee* v. *INS*, 550 F. 2d 554, 556 (9th Cir. 1977); see also *Acosta* v. *Gaffney*, *supra*, 558 F. 2d at 1158.

3. Petitioner also argues (Pet. 14) that the court of appeals erred in allegedly equating the phrase "exceptional hardship" in 8 U.S.C. 1182(e) with "extreme hardship" in 8 U.S.C. 1254(a)(1).[5]

This contention lacks substance. The Service correctly applied the exceptional hardship standard to petitioner's application (Pet. App. A-15 to A-19; A.R. 28-29, 116-118; R. 55), and the court of appeals reviewed this determination under the appropriate "abuse of discretion" standard (Pet. App. A-1). In concluding that the Service had not abused its discretion, the court, using the "see" introductory signal, did cite three appellate cases upholding Service rejections of Section 1254(a)(1) applications (Pet. App. A-1). Since these applications involved allegations of hardship essentially identical to those asserted by petitioner, and since "extreme hardship" and "exceptional hardship" are at least analogous standards, the court justifiably relied on the three opinions as "basic source material that supports the proposition." *A Uniform System of Citation* §2:3, at 6-7 (12th ed. 1976). In any event, petitioner could not have established sufficient hardship under either standard. Compare, *e.g.*, *Lee* v. *INS*, *supra*, 550 F. 2d at 556 (inconvenience to citizen child and economic detriment to family not sufficient to show extreme hardship), with

[5]Section 1254(a)(1) provides for discretionary suspension of deportation where, in addition to other conditions, deportation would "result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence * * *."



*Perdido* v. *INS*, *supra*, 420 F. 2d at 1180-1181 (adjustment hardships for two citizen children of Philippine parents not sufficient to show exceptional hardship).

4. Lastly, petitioner claims (Pet. 15-16) that the INS Regional Commissioner "in effect made a rule concerning all South Korean hardship waivers," but failed to comply with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. 500 *et seq.* But the Regional Commissioner, of course, made no rule. The administrative action here was an adjudication—the application of a statutory standard to the facts of an individual case, see *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973). The determination that petitioner failed to meet the "exceptional hardship" standard does not prevent another applicant from South Korea from establishing that, on the facts of his case, the standard has been met. The requirements for rule-making set forth in the Administrative Procedure Act have no application to adjudicative proceedings such as this one. *Mehta* v. INS, 574 F. 2d 701, 705 (2d Cir. 1978).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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